women denied observing anyone exposing himself. JA 341-343 (Christian Notes); JA 914 (Christian Depo. 69:5-8). The Honeywell employees that made the report had received information from an individual named Paulette, who owned a company that did business with Honeywell. JA 913 (Christian Depo. 67:4-22). Christian proceeded to contact Paulette to gather additional information. Paulette would not give any names at first, but after much insistence from Christian, Paulette stated that the person making the complaint was Cheshewalla. JA 913 (Christian Depo. 67:23-69:19). From her conversation with Paulette, Christian believed that Cheshewalla was the person complaining about being flashed, but Cheshewalla would not acknowledge having any information about the incident. JA 341-342 (Christian Notes); JA 913 (Christian Depo. 68:18-22; 69:9-16); JA 914 (Christian Depo. 71:8-17); JA 915 (Christian Depo. 74:1624). Since none of Rand female employees reported any problems at work during the interviews, and none of them verified that they had observed any individual exposing himself, Christian closed the file on the matter on November 16, 2000. JA 751 (Hageman Affidavit ¶ 3); JA 343 (Christian Notes).

On December 19, 2000, Christian received an anonymous telephone call from someone stating that Mike Gibbins had "stepped over the line" and was harassing someone. The caller did not identify Cheshewalla. JA 343 (Christian Notes); JA 915 (Christian Depo. 75:3-15). Following the anonymous call, Rand management immediately transferred Gibbins to another work location. JA 916 (Christian Depo. 78:5-11); JA 918 (Christian Depo. 86:10-15).

Gibbins returned to the Honeywell facility to attend the annual Christmas party on December 22, 2000. At that party, he announced to a group of people his plans to visit his children in Oklahoma at which time Cheshewalla

volunteered to lend Gibbins her car. JA 1005 (Gibbins Depo. 109:20-110:20).

On December 28, 2000, Cheshewalla made an appointment and came to see Christian about Gibbins. She complained that Gibbins had been sent away, stated that Gibbins was one of three men she "trusted," and begged for Gibbins to come back, thoroughly confusing Christian as to what, if anything, was going on because Christian suspected that the party allegedly being harassed was Cheshewalla. JA 921 (Christian Depo. 97:15-19); JA 939 (Christian Depo. 169:16-170:2). As a result of what Cheshewalla told Christian, on January 8, 2001, Gibbins returned to the Honeywell facility. JA 921 (Christian Depo. 97:5-19).

On January 12, 2001, Cheshewalla contacted Les Williams at the Laborer's Union Hall, making a verbal complaint that Gibbins was harassing her. Williams contacted Ernie Patires, Rand's Vice President and Project Manager, with this information. JA 162 (Patires Affidavit ¶ 43); JA 184 (Patires Notes); JA 347 (Christian Notes). Gibbins was immediately removed from the Honeywell facility, where he has never again been stationed. JA 103 (Gibbins Depo. 103:1-11). Gibbins was transferred to an outdoor, less attractive job. He also lost his blue badge. JA 162 (Patires Affidavit ¶¶ 44-45). Rand management also found out the day he was transferred that Gibbins had Cheshewalla's car (that he had previously borrowed) and forced him to return the car immediately. JA 1019 (Patires Depo. 32:24-33:7).

After Gibbins was transferred, Christian continued to interview a number of employees regarding the allegations of harassment. JA 190 (Christian Affidavit ¶ 9); JA 196-204 (Christian Notes). On January 18, 2001, Gibbins was interviewed and signed a statement denying that he had

any personal relationship with Cheshewalla, or that he had harassed her in any way. JA 205 (Christian Notes); JA 935 (Christian Depo. 151:3-11). Christian interviewed Cheshewalla numerous times and asked her to sign a statement about Gibbins. JA 1071 (Cheshewalla Depo. 176:23-177:10). Cheshewalla stalled the process and refused to sign a statement about any alleged conduct by Gibbins. JA 190 (Christian Affidavit ¶ 8).

Many other Rand employees were interviewed, and a number of them noted Cheshewalla's overly friendly, flirtatious attitude toward the men working at the Honeywell facility. JA 352 (Christian Notes); JA 845 (Williams Depo. 29:14-22); JA 937 (Christian Depo. 162:15-25); JA 862 (Josh Franks Depo. 37:21-38:2). One Rand employee even noted Cheshewalla's open comment to other coworkers that "I won't do you, you, and you" making a reference to having sexual intercourse with these coworkers. JA 352 (Christian Notes); JA 847 (Williams Depo. 39:14-41:17).

On January 25, 2001, Petkoff and Cheshewalla came in together and for the first time Cheshewalla made specific accusations to Rand against Gibbins. JA 205 (Christian Notes); JA 948 (Christian Depo. 206:14-19). By that time, Gibbins had been removed from the Honeywell Maintenance facility for nearly two weeks.

Rand's workload – particularly at government facilities – is cyclical in that the down cycle is manifest at the beginning of each year, as the funding for government contracts has yet to be received. JA 960 (Franks Depo. 19:9-21); JA 159 (Patires Affidavit ¶ 17). When workloads are low, layoffs are common. JA 961 (Franks Depo. 23:3-20); JA 159 (Patires Affidavit ¶ 17). When Rand is faced with a layoff of workers at the Honeywell facility, Honeywell has always demanded that every effort be made to retain blue badge workers over red badge workers. JA 159

(Patires Affidavit ¶ 19); JA 887 (Burke Depo. 35:15-17); JA 161 (Franks Depo. 22:5-8); JA 952 (Christian Depo. 223:24-224:5); JA 752 (Hageman Affidavit ¶ 7). In late January 2000 and into February, Rand was running quite low on work for laborers and carpenters and many were laid off. JA 159 (Patires Affidavit ¶¶ 20-34).

Ernie Patires, Rand's Vice President since approximately 1988, is responsible for the hiring, firing and laying off of carpenters, laborers, cement finishers, and operating engineers. JA 1015 (Patires Depo. 13:3-8); JA 884 (Burke Depo. 23:21-25). In determining who to lay off, Patires first seeks to retain blue badge employees over red badge employees in accordance with Honeywell's directive. JA 159 (Patires Affidavit ¶ 19); JA 887 (Burke Depo. 35:15-17); JA 752 (Hageman Affidavit ¶ 7). Patires solicits information from Rand's carpenter foreman, David Burke and superintendent Danny Franks, as to the specific labor needs remaining and the work situation. JA 1015 (Patires Depo. 13:9-14:7); JA 161 (Patires Affidavit ¶ 39). David Burke and Danny Franks are located at the Honeywell facility. JA 880 (Burke Depo. 6:22-25); JA 960 (Franks Depo. 17:25-18:4). Patires Depo. Patires also looks at work quality, supervisory skills and specialized skills in determining layoffs. JA 161 (Patires Affidavit ¶ 40).

On or about July 17, 2000, Aaron Michaels was hired as a carpenter apprentice at Rand's Honeywell jobsite. JA 189 (Christian Affidavit ¶ 3). As an apprentice, Michaels was "uncleared", and thus a "red badge" employee. JA 1118 (Michaels Depo. 37:3-14). Pursuant to the Joint Carpenter's Agreement negotiated by the Union, Rand must employ at least two journeyman carpenters to every apprentice. JA 159 (Patires Affidavit ¶ 15).

Robert Petkoff was first hired by Rand on October 7, 1997, as a journeyman carpenter to work at its Bayer

jobsite. JA 158 (Patires Affidavit ¶ 4). Petkoff was laid off on January 2, 1998, less than three months later, due to a lack of work. JA 158 (Patires Affidavit ¶ 5). Petkoff was rehired on October 31, 2000 as a red badge journeyman carpenter after he contacted Rand looking for work. JA 158 (Patires Affidavit ¶ 7).

Beginning in late January and continuing through February 2001, Cheshewalla missed numerous days of work and failed to call in or report that she would be off on a number of those days. Cheshewalla failed to call in and to show up for work on January 30, 31 and February 1, 2001. JA 190 (Christian Affidavit ¶ 15); JA 206-210 (Christian Notes). An employee who does not show up for work and who does not call in for three consecutive days is considered a voluntary quit. JA 951 (Christian Depo. 218:10-24). On February 2, 2001, Cheshewalla called and said she would be in late, but never reported to work. JA 191 (Christian Affidavit ¶ 16). On February 7, 2001, Cheshewalla did not report for work saying her "car needed repairs." JA 191 (Christian Affidavit ¶ 17). On February 8, 2001, Cheshewalla again called in and said she would not be in to work. JA 191 (Christian Affidavit ¶ 18). Cheshewalla did not call in and did not show up for work on February 9, 2001. JA 191 (Christian Affidavit ¶ 19). On February 15, 2001, Cheshewalla called in and said she would not be at work because "she couldn't get her car doors open." JA 191 (Christian Affidavit ¶ 20). On February 16, 2001, Cheshewalla called in and said she would not be at work because the "regulator" and "alternator" on her car needed to be replaced. Cheshewalla then inquired as to whether she still had a job. JA 191 (Christian Affidavit ¶ 21). That same day, Patires called Cheshewalla and told her she was laid off. JA 219 (Christian Depo. 219:12-24). At the time she was laid off,

Cheshewalla was the last laborer working at the Honeywell jobsite. JA 160 (Patires Affidavit ¶ 26). Cheshewalla acknowledges she was absent many days before she was laid off. JA 1072 (Cheshewalla Depo. 178:8-11).

In late December 2000, work got slow at the Honeywell facility and Rand laid off red badge journeyman carpenter Jason Smith. JA 159 (Patires Affidavit ¶ 20). Work continued to decline in January 2001 and on January 25, 2001, red badge journeyman carpenters Jeff Barr and Tim Paul were laid off. JA 160 (Patires Affidavit ¶ 21). On January 29, 2001, Patires laid off Michaels and Petkoff due to lack of work. JA 160 (Patires Affidavit ¶ 22). At the time Michaels was laid off, he was the last red badge carpenter apprentice still working for Rand at its Honeywell jobsite and no other red badge carpenter apprentices were retained at that time. JA 160 (Patires Affidavit ¶¶ 23-25). The only red badge journeyman carpenters remaining at Honeywell at the time Petkoff was laid off were Danny Chrisman, Robert Carpenter and Art Porter, all of whom had more seniority than Petkoff. JA 160 (Patires Affidavit ¶ 24). On or about February 8, 2001, red badge journeyman carpenter Danny Chrisman quit. JA 160 (Patires Affidavit ¶ 27). On or about February 14, 2001, John Coning was rehired by Rand as a blue badge superintendent carpenter to run work in other cities. JA 160 (Patires Affidavit ¶ 28). On or about February 26, 2001, red badge journeyman carpenter Rob Carpenter was laid off. JA 160 (Patires Affidavit ¶ 30). On or about April 5, 2001, the workload continued to decline and red badge journeyman carpenter Art Porter and blue badge journeyman carpenter Dennis Williams were laid off. JA 160 (Patires Affidavit ¶ 31). Work continued to decline and layoffs continued, such that by April 5, 2001, the only carpenters remaining were either blue badges, red badge journeyman carpenters with specialized skills such as

refrigeration, or those that were traveling superintendents. JA 161 (Patires Affidavit ¶ 32). No other carpenters were hired during this time period. JA 160 (Patires Affidavit ¶ 33). In fact, the workload dropped off so much that at one point there were only two blue badge carpenters, Danny Franks and Josh Franks, working at the Honeywell jobsite. JA 161 (Patires Affidavit ¶ 34).

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because The Eighth Circuit's Definition Of Who Is A Supervisor Properly Balances Agency Principles Of Vicarious Liability With Title VII's Goal Of Encouraging Proactive Resolution Of Workplace Harassment.

The Eighth Circuit has held that in order to be considered a supervisor such that vicarious liability would apply under Title VII, "the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties." This definition of who is a supervisor properly balances agency principles of vicarious liability with Title VII's goal of encouraging proactive resolution of work place harassment and should not be disturbed.

One of the main purposes of Title VII is to encourage proactive resolution of workplace harassment. In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), this Court noted that the primary objective of Title VII was not to provide redress, but to avoid harm. *Faragher*, 524 U.S. at 806. This Court's stated goal in *Faragher/Ellerth* was to balance agency principals of vicarious liability with Title VII's goal of encouraging employers to promulgate and

enforce anti-discrimination/harassment policies and encouraging employees to avoid the harm caused by harassment and discrimination by promptly reporting such misconduct. *Id.* This Court stated that "[i]t would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive." *Id.*

Rand took its affirmative obligation to prevent violations of Title VII seriously. Rand promulgated a sexual harassment policy, disseminated that policy to all employees, and it was signed by each of the Petitioners in this case. JA 911 (Christian Depo. 59:2-12). Rand's sexual harassment policy was posted at the jobsite, and every January the policy was distributed to all employees with their paycheck. JA 911 (Christian Depo. 56:2-12); JA 858 (Franks Depo. 24:3-8). The complaint procedures within Rand's sexual harassment policy demonstrate Rand's reasonable care in preventing sexual harassment, as there are alternative methods of reporting sexual harassment other than through the harassing supervisor. JA 383 (Rand's Sexual Harassment Policy).

Not only did Rand have a comprehensive sexual harassment policy, but it acted diligently and thoroughly when confronted with incidents of potential sexual harassment. In the present case, Rand immediately started an investigation in November 2000 when it first heard of any potential problem (that being a rumor that a male employee had exposed himself). Rand investigated this rumor by interviewing every woman, including Cheshewalla, employed by Rand at any Honeywell jobsite.

No one reported any problems; thus, the investigation was closed. The next time Rand was aware of any potential harassment was when it received an anonymous telephone call on December 19, 2000. Rand restarted its investigation and again interviewed every Rand employee working at any Honeywell jobsite. More importantly, suspecting Cheshewalla might be the person allegedly harassed, Rand immediately took remedial action by transferring Gibbins (the name provided in the anonymous phone call) to another jobsite solely on the basis of the anonymous telephone call. After Cheshewalla told Rand (on December 28, 2000) that she was upset that Gibbins had been transferred because Gibbins was one of the three people she could trust, and begged for his return, Rand officials were confused and concluded that they did not have sufficient information to conclude Gibbins was guilty of anything. Therefore Rand permitted Gibbins to return to the Honeywell maintenance jobsite on January 8, 2001. Then, on January 12, 2001, Cheshewalla alleged to the union business agent that she had been sexually harassed by Gibbins. Gibbins was immediately and permanently transferred from the Honeywell maintenance jobsite on the basis of this report, even before Cheshewalla had confirmed the reports directly to Rand. Gibbins never returned to the Honeywell maintenance jobsite after that date and, moreover, Cheshewalla did not report any harassment occurring after that date when Christian was first alerted that it was *in fact* Cheshewalla who was allegedly being harassed by Gibbins. Gibbins lost his blue badge security clearance, and he was transferred to an outdoor, more onerous jobsite. In light of the foregoing, it cannot be disputed that Rand acted promptly and with reasonable care to correct the sexual harassment alleged by Cheshewalla.

In their Petition, Petitioners seek a broadening of the definition of a "supervisor" that is inconsistent with the policy rationale underlying Title VII and expressly relied upon by this Court: encouraging forethought on the part of employers and saving action by employees. *Ellerth*, 524 U.S. at 764; *Faragher*, 524 U.S. at 805-06. The nebulous standard for determining which employees are supervisors advocated by Petitioners would create less incentive for companies to engage in preventative forethought. The definition sought by Petitioners would undermine the remedial purposes of Title VII were it to subject employers such as Rand to sexual harassment liability despite their prompt and effective action in investigating incidents and removing perpetrators from the workplace.

Ellerth and *Faragher* held that vicarious liability for an employee is automatic if a supervisor engages in sexually harassing conduct that culminates in a "tangible employment action." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08. In *Ellerth*, this Court defined a "tangible employment action" as an action that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. This Court went on to describe a second class of cases where vicarious liability would apply. An employer will also be vicariously liable in situations where a supervisor has created an actionable hostile work environment but no tangible employment action is taken. *Id.* at 764-65. However, in these cases, liability is not automatic, but subject to an affirmative defense. An employer will avoid vicarious liability if it can show by a preponderance of the evidence that (a) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (b) the plaintiff employee unreasonably failed to take advantage

of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.* at 765; *Faragher*, 524 U.S. at 807. Conversely, if the harasser is a co-employee of the victim, and not a supervisor, the employer does not face vicarious liability. Rather, a negligence standard is employed by which an employer will be liable if it knew or should have known of the conduct and failed to take proper remedial action. *Ellerth*, 524 U.S. at 759.

Ellerth and *Faragher* did not answer the question of who is a supervisor. However, *Ellerth* did explain that a supervisor is a person who has been empowered by the employer "as a distinct class of agent to make economic decisions affecting other employees under his or her control" and that "[t]angible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Id.* at 762. *Ellerth* noted that such empowerment may significantly increase the supervisor's power to harass:

> A co-worker can break a co-worker's arm as easily as a supervisor, and anyone who has regular contact with an employee can inflict psychological injuries by his or her offensive conduct. But one co-worker (absent some elaborate scheme) cannot dock another's pay, nor can one co-worker demote another. Tangible employment actions fall within the special province of the supervisor.

Id. (citations omitted).

The Eighth Circuit's definition of a supervisor utilized in this case is consistent with the language and rationale of *Ellerth* and is in accord with decisions of other circuit courts. In *Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498, 506 (7th Cir. 2004), the court held that higher ranking co-workers who managed the employee's work assignments,

investigated complaints and disputes, and made recommendations concerning sanctions for rule violations, were not the employee's supervisors because they did not have authority to make any decisions affecting terms and conditions of the employee's employment, i.e., the authority to hire, fire, promote, demote, discipline or transfer her. *See also Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002). In *Noviello v. City of Boston*, 398 F.3d 76, 96 (1st Cir. 2005) the court agreed with the Seventh Circuit that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment and that this authority primarily consists of the "power to hire, fire, demote, promote, transfer or discipline an employee." In *Mikels v. City of Durham, N.C.*, 183 F.3d 323, 333-34 (4th Cir. 1999), the court held that occasional authority to direct operational conduct without the power to take tangible employment actions was not sufficient to establish supervisory status. *See also Church v. Maryland*, 53 Fed. Appx. 673 (4th Cir. 2002). In *Stevens v. U.S. Postal Service*, 21 Fed. Appx. 261 (6th Cir. 2001), the court held that a postal service employee who had only informal supervisory duties, but did not have the formal title of supervisor nor the power to hire or fire a postal clerk, was not the clerk's "supervisor" for purposes of a Title VII sexual harassment claim.

The Eighth Circuit definition of a supervisor (along with those of the other circuit courts listed above) is entirely consistent with the doctrine set forth in *Faragher* and *Ellerth*. This definition properly subjects employers to vicarious liability when harassment is conducted by an individual who has been empowered by an employer to take or bring about tangible employment actions against a victim. Imposing vicarious liability on employers for harassment committed by such empowered supervisors makes sense because the number of supervisors is limited

and therefore an employer can reasonably guard against their misbehavior. *Faragher*, 524 U.S. at 800-01. As this Court stated in *Faragher* "[r]ecognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim's employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity to screen them, train them, and monitor their performance." *Id.* at 803. Conversely, if the employee in question does not have the power to take a tangible employment action against a victim, the purposes of Title VII are best served by applying the co-worker negligence standard. This standard promotes the remedial provisions of Title VII by encouraging employers to establish and promote strong sexual harassment policies, and also encourages employees to take advantage of those policies and report instances of sexual harassment. Far from giving a free pass to any employer, as Petitioners contend, the co-worker standard properly punishes employers who know or should have known of the conduct in question and fail to take proper remedial action, while properly rewarding employers who establish a strong sexual harassment policy, are diligent in monitoring potential problems, and swiftly and decisively take proper remedial action when alerted to harassing situations.

The Eighth Circuit standard properly subjects employers to vicarious liability for the actions of supervisors whom employers have empowered with the ability to affect the terms and conditions of a victim's employment by hiring, firing, promoting, demoting, or reassigning to significantly different duties. These "supervisors" are individuals who truly have the opportunity to use their power to engage in improper actions against subordinates. An employer responsible for placing individuals in these

supervisory positions can fairly be said to have assumed the risk that they will misuse those powers. Conversely, the supervisor definition advocated by Petitioners would unfairly subject employers to vicarious liability in a multitude of workplace relationships where the employer has done nothing to empower individuals with authority that could potentially be misused. In the modern day workplace, unless all workers are automatons, there are necessarily numerous interactions of a supervisory nature on a regular basis amongst nearly all co-workers. For example, if one co-worker has a project that needs to be done, and solicits help from and directs another co-worker regarding what to do on that project, that co-worker could be said to be a supervisor and therefore subject an employer to vicarious liability. In this scenario, an employer would be placed in the impossible position of attempting to monitor every workplace relationship among all of its employees. Such a burden is unfair and unreasonable. The Eighth Circuit standard provides a clear and bright rule for employers and employees alike. When someone can control an employee by having the ability to hire, fire, promote, demote, or reassign to significantly different duties, he can be deemed a supervisor, and an employer will be subject to vicarious liability if those individuals subsequently harass their subordinates. If employers in fact have not empowered individuals with the potentially misused ability to take tangible employment actions against others in the workplace, the negligence standard properly protects workers and encourages employers to take remedial measures.

Petitioners cite three cases that they contend constitute a conflict in authority among the circuit courts. However, an analysis of those cases shows that Petitioners' contention of conflict is overstated and does not constitute sufficient grounds for granting the Petition.

Petitioners' contention that the decision in *Gawley v. Indiana University*, 276 F.3d 301 (7th Cir. 2001), conflicts with the Eighth Circuit's decision has no merit. Petitioners mistakenly state that in *Gawley* "the Seventh Circuit held that the harasser qualified as a supervisor for imputing liability to the employer even though he did not have the power to hire or fire the plaintiff since he had the power to initiate disciplinary proceedings against her and to delay her receipt of essential equipment." Petition at p.13. In reality, the court in *Gawley* reached no such conclusion. In fact, the court determined that it "need not definitively decide this question, however, because even if we assume [the harasser] was a supervisor as defined in *Ellerth* and *Faragher*, the university was entitled to raise an affirmative defense." *Id.* at 311. The court then held that the university satisfied both requirements of the affirmative defense. *Id.* at 312. Far from determining the harasser was a supervisor, as Petitioners contend, the court declined to rule on that issue because it found that even if the harasser was a supervisor, the defendant was entitled to summary judgment based on the affirmative defense set forth in *Ellerth* and *Faragher*.

Accordingly, the Seventh Circuit's decision in *Gawley* in no way conflicts with the Eighth Circuit decision here (and those other circuits listed above). Further, *Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498 (7th Cir. 2004), *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002), and other Seventh Circuit cases, decided after *Gawley*, adopt the same definition that the Eighth Circuit did in the present case.

In *Suders v. Easton*, 325 F.3d 432 (3rd Cir. 2003), *cert. granted*, 540 U.S. 1046, 124 S. Ct. 803, 157 L. Ed.2d 692 (2003), the Third Circuit did not make a definitive determination as to what was required for supervisory status. The Court merely found that "the record in this case

clearly reflected that (1) Easton was responsible for the day-to-day supervision of the McConnellsburg barracks and (2) both Baker and Prendergast had supervisory duties with respect to "running [their] shift[s]." *Id.* at 450. The court found that these allegations raised a genuine issue of material fact as to their supervisory authority, but made no determination as to whether those facts alone satisfied a finding of supervisory liability.

Only *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2nd Cir. 2003) arguably relaxes the standards set forth by the Eighth Circuit and all other circuit courts in determining who is a supervisor. In *Mack*, the court found that because the alleged harasser was the senior employee regularly on site, was the mechanic in charge, and had and exercised the authority to make and oversee the daily work assignments of the mechanics and mechanic's helpers, that the harasser was a supervisor. *Id.* at 127 n.11. This statement is set forth in a footnote, contains little analysis, is inconsistent with *Faragher/Ellerth* and does not constitute a conflict amongst the circuits such that the Petition should be granted. As set forth above, the Eighth Circuit standard for determining who is a supervisor, which is harmony with decisions of all other circuit courts, best promotes the purposes of Title VII.

Even if the court were to adopt the arguably relaxed standard contained in *Mack*, it is readily apparent that Gibbins would not be considered a supervisor even under that relaxed standard. Key to the court's holding in *Mack* were the facts that the alleged harasser was the "senior employee regularly on site" and "had and exercised the authority to make and oversee the daily work assignments of the mechanics and mechanic's helpers." *Id.* at 127 n.11. Neither of these factual predicates exist in the present case. As the district court found, Dave Burke was the superintendent, or lead foreman, at the Honeywell site

and was clearly senior to Gibbins. See Exhibit B to Petition at p. 14a. Further, Danny Franks was the carpenter's foreman and, as the carpenter's foreman, Franks provided Gibbins with direction as to what work needed to be performed by the laborers. *Id.* Thus, unlike in *Mack*, Gibbins was neither the senior employee regularly on site nor did he exercise the authority to make and oversee the daily work assignments of Cheshewalla.

Finally, Petitioners' argument that the circuit court's definition of a supervisor somehow "gives employers an inoculation against liability and emasculates protection afforded victims" does not withstand careful scrutiny, and provides no basis for granting the Petition. Almost all companies reserve final decision-making power in some person or entity other than the immediate supervisor, and there is no reason to believe that companies will ever be able to eschew the evaluative and administrative processes so completely that personnel decisions are formulated and influenced solely by individuals who have never had any contact with the subject employee.

Respondents' argument also ignores the undisputed record in this case, which shows that Gibbins did not have authority to hire, fire, promote or reassign Cheshewalla to significantly different duties and that, at most, Gibbins had some direction over her daily activities (which all courts have acknowledged does not elevate an individual to supervisor status for a vicarious liability). Further, in making decisions to lay off or reassign workers Ernie Patires solicited information from Rand's carpenter foreman, David Burke and superintendent Danny Franks, not Gibbins. There is no evidence that any recommendations Gibbins may have offered (albeit indirectly to Mr. Franks or Mr. Burke) were given substantial weight as would be required for Gibbins to even arguably be considered a "supervisor."

II. The Petition Should Not Be Granted Based On Any Alleged Conflict Between The Eighth Circuit And The Supreme Court Regarding Vicarious Liability In A Supervisor Sexual Harassment Case Being Predicated On Apparent Authority.

Petitioners' argument that the Petition should be granted because of a conflict with *Faragher/Ellerth* as to whether vicarious liability in a supervisor sexual harassment case may be predicated on apparent authority has no merit because the district court did in fact consider and reject that Gibbins had apparent authority, the facts in the case cannot support a finding of apparent authority, and the issue is not important enough to merit review.

Petitioners' assertion that the district court opinion simply ignored the "apparent authority" prong of *Faragher* and *Ellerth* is untrue. While duly noting that under Eighth Circuit precedent supervisory status could not be created based on apparent authority, the district court also agreed with Rand that 'agency principles require some act by the employer to create apparent authority; an individual cannot create his own apparent authority." Petition, Appendix A at p. 15a. This statement by the district court indicates that the district court in fact considered the apparent authority argument and rejected it based on the briefing and factual record in the case.

A review of the record confirms that the district court was right to reject a finding of supervisory status based on apparent authority as Petitioners have, in addition to failing to advance sufficient facts to make such a finding, made admissions fatal to any such finding. "Apparent authority results from a manifestation by a principal to a third party that reasonably leads a third party to believe that another person is acting as the principal's agent." *Millard Processing Services, Inc. v. N.L.R.B.*, 2 F.3d 258,

262 (8th Cir. 1993); *See also*, Restatement (Second) of Agency § 27 (1957).[2] In arguing that Gibbins had apparent authority to terminate Cheshewalla, Cheshewalla conveniently ignores the rule that the reasonable belief upon which Gibbins' apparent authority is based must be manifested by the *principal* (in this case Rand), not by the alleged tortfeasor. Cheshewalla admits that both "Christian and Patires told Monika that Gibbins could not lay her off," yet despite this fact she states that she continued to believe that he could. Because of this admission, she could not, as a matter of law, have a "reasonable belief" that Gibbins had authority to fire her or lay her off.

The facts cited by Petitioners to support their theory of apparent authority are misleading at best and illustrate the inherent difficulty in supporting a position in which apparent authority is based on after-the-fact, subjective belief. Gibbins was immediately transferred from the job site when Cheshewalla complained – and he never returned. Not only could he not lay her off, but Cheshewalla was not laid off until weeks later when she stopped showing up for work.

Petitioners state that Rand had "substantial knowledge that Gibbins was purporting to exercise the authority to fire and lay off workers, the record shows that Rand did *absolutely nothing* to stop Gibbins from making those claims. He kept making them. There is not a shred of evidence showing that Rand even instructed Gibbins to stop such threats, much less any evidence of disciplining him for making them." All information referenced in this

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[2] Comment a to § 27 provides in pertinent part, "For apparent authority there is the basic requirement that the principal be responsible for the information which comes to the mind of the third person, similar to the requirement for the creation of authority that the principal be responsible for the information which comes to the agent."

alleged evidence of "substantial knowledge" came from Christian's notes of a January 25 meeting with Cheshewalla. Far from doing "absolutely nothing," by this time, Gibbins had been removed from the workplace for several weeks and could not impact Cheshewalla's employment or make any claims that he could. This is a further example of misleading chronological fact shifting by the Petitioners.

Even assuming *arguendo* that Gibbins actually threatened to fire her, Cheshewalla's "reasonable belief" cannot be based on Gibbins' conduct. *See*, *Bonenberger v. Plymouth Tp.*, 132 F.3d 20, 28 (3rd Cir. 1997) (rejecting vicarious liability as inappropriate when plaintiff knew harasser had no authority to fire her, "even assuming he threatened to do so"). Cheshewalla's subjective belief that Gibbins could and would fire her was not manifested by Rand. In fact, Rand took affirmative steps to dispel any confusion that Gibbins might have regarding such authority by telling Cheshewalla that Gibbins could not lay her off. Accordingly, Cheshewalla cannot as a legal matter succeed on an apparent authority analysis. Granting the Petition to examine that issue is therefore not appropriate.

III. The Petition Should Be Denied Because Even If The Court Were To Find In Petitioners' Favor Under Either Of The Two Questions Presented, The Sexual Harassment Claim Still Fails.

If the court were to ultimately decide either of the questions presented in Petitioners' favor, the ultimate favorable result for Petitioners would be a determination that Gibbins was a supervisor (as opposed to a mere co-worker). But a finding that Gibbins was a supervisor

would do nothing to alter the outcome in this case. Because the district court and circuit court both found that Gibbins was not a supervisor, they had no reason to address the question of whether Rand would be entitled to summary judgment pursuant to the affirmative defenses set forth in *Ellerth* and *Faragher*. Here, even if a ruling of this court were to overturn the lower court's holding that Gibbins was not a supervisor, a judgment in Rand's favor would still stand because the uncontroverted facts show that Rand satisfied the *Faragher/Ellerth* affirmative defenses.

In its Order granting Rand's Motion for Summary Judgment, the district court held that Gibbins was not a supervisor. The district court then noted that to prevail on her theory, Petitioner needed to prove that Rand knew or should have known about the alleged harassment and failed to take proper action. The district court found that Rand was not liable for Gibbins' conduct under this co-employee standard because Rand took proper action. Significantly, the Petitioners did not appeal the district court's holding that Rand took proper actions once it was alerted to allegations of alleged harassment.

There is no factual dispute that Gibbins did not take any action against Cheshewalla that would satisfy the *Ellerth* requirements for a tangible employment action. Gibbins did not fire Cheshewalla, did not fail to promote Cheshewalla, did not reassign Cheshewalla to a different job with significantly different responsibilities, and made no decision causing a significant change in benefits to Cheshewalla. Because no tangible employment action was taken against Cheshewalla, Rand is able to utilize the *Faragher/Ellerth* affirmative defense.

To satisfy the first element of the affirmative defense, Rand must show that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior *Ellerth*, 527 U.S. at 764-65; *Faragher*, 524 U.S. at 807-08. The record shows that Rand promulgated a sexual harassment policy, disseminated that policy to all employees, and it was signed by each of the plaintiffs. JA 911 (Christian Depo. 59:2-12). Rand's sexual harassment policy was posted at the job site, and every January the policy was distributed to all employees with their paychecks. JA 911 (Christian Depo. 56:2-12); JA 858 (Franks Depo. 24:3-8). The complaint procedures within Rand's sexual harassment policy demonstrate Rand's reasonable care in preventing sexual harassment, as there are alternative methods of reporting sexual harassment other than through the harassing supervisor. JA 383 (Rand's Sexual Harassment Policy).

The undisputed facts further show that Rand immediately started an investigation in November 2000 when it first heard of any potential problem (that being a rumor that a male employee had exposed himself). JA 913 (Christian Depo. 67:2369:8); JA 750 (Hageman Affidavit ¶ 2). Rand investigated this rumor by interviewing every woman, including Cheshewalla, employed by Rand at *any* Honeywell job site. *No one* reported any problems; thus, the investigation was closed. JA 751 (Hageman Affidavit ¶ 3). The next time Rand was aware of any potential harassment was when it received the anonymous phone call on December 19, 2000. JA 915 (Christian Depo. 75:7-15); JA 946 (Christian Depo. 199:20-25); JA 751 (Hageman Affidavit ¶ 4). Rand restarted its investigation and interviewed almost every Rand employee working at any Honeywell job site. More importantly, suspecting Cheshewalla might be the person allegedly harassed, Rand immediately took remedial action by transferring

Gibbins (the name provided in the anonymous phone call) to another jobsite. JA 918 (Christian Depo. 86:10-15). After Cheshewalla told Rand (on December 28, 2000) that she was upset that Gibbins had been transferred because Gibbins was one of the three people she could trust, and begged for his return, Rand officials were confused and concluded that they did not have sufficient information to conclude Gibbins was guilty of anything. JA 921 (Christian Depo. 97:15-19); JA 939 (Christian Depo. 169:24-170:2). At that point, Gibbins returned to the Honeywell Maintenance job site on January 8, 2001. JA 921 (Christian Depo. 97:1-19); JA 1003 (Gibbins Depo. 102:23-103:6). Then, on January 12, 2001, Cheshewalla alleged to the union business agent that she had been sexually harassed by Gibbins. JA 184. Gibbins was immediately and permanently transferred from the Honeywell maintenance job site on the basis of this report, even before Cheshewalla had confirmed the reports directly to Rand. Gibbins never returned to the Honeywell maintenance job site after that date. JA 1003 (Gibbins Depo. 103:1-11). Moreover, Cheshewalla did not report any harassment occuring after that date, when Christian was first alerted that it was in fact Cheshewalla who was allegedly being harassed by Gibbins. Gibbins lost his blue badge security clearance, and he was transferred to an outdoor, more onerous jobsite. JA 162 (Patires Affidavit ¶¶ 44-45). Eventually, Gibbins was demoted from his foreman status. JA 162 (Patires Affidavit ¶ 45). In light of the foregoing, it is undisputed that Rand acted with reasonable care to correct the sexual harassment alleged by Cheshewalla.

In order to satisfy the second element of the affirmative defense, Rand must show that Cheshewalla unreasonably failed to take advantage of any preventative or corrective opportunities provided by Rand or to avoid

harm otherwise. *Ellerth*, 527 U.S. at 764-65; *Faragher*, 524 U.S. at 807-08.

Regarding that element, it is undisputed that Cheshewalla did not report Gibbins' alleged conduct until, at the earliest, January 12, 2001, when she reported allegations to the *union business agent* (not Rand). Indeed, she even *misled* Rand officers by bemoaning the transfer of one of three men she "trusted." However, Cheshewalla still did not report any alleged harassment *directly to Rand* until January 25, 2001 – *five months* after she began working at Rand – when Cheshewalla was interviewed by Christian and Patires. JA 948 (Christian Depo. 206:14-19); JA 205. Most, if not all, of any alleged harm to Cheshewalla (even though Rand denies Cheshewalla suffered any such harm) could have been avoided by Cheshewalla simply reporting Gibbins at the beginning of the "harassment" – which Cheshewalla maintains began "the first day" she started working at Rand. Under these circumstances, Cheshewalla did not exercise reasonable care to avoid sexual harassment by Gibbins or to otherwise avoid harm.

IV. No Basis Exists To Grant The Petition To "Renew" The Retaliation Case.

On page 17 of the Petition, Petitioners argue that "the retaliation case should also be renewed because its dismissal was a product of the lower court's failure to recognize the actionable nature of the underlying conduct." This assertion provides absolutely no basis for granting the Petition. Neither of the questions presented in the Petition have anything to do with the retaliation case. Further, Petitioners make no argument other than to disagree with the factual findings of the lower courts. That

does not constitute proper grounds for granting the Petition.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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